Supreme Court, U.S.
FILED
FEB 7 1997
CLERK

(2)

No. 96-1084

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

MARK MOREHEAD,
Petitioner,

vs.

ATKINSON-KIEWIT, J.V. and WOODS HOLE TOWING COMPANY, INC.,
Respondents.

ROCCO P. DIGIOVANNI, JR.,
Petitioner,

vs.

TRAYLOR BROTHERS, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENT TRAYLOR BROTHERS' BRIEF IN OPPOSITION

Andrew Rothschild
Counsel of Record for Respondent Traylor Brothers, Inc.
Eric D. Paulsrud
Appearing on the Brief
LEWIS, RICE & FINGERSH, L.C.
500 North Broadway, Suite 2000
St. Louis, Missouri 63102
(314) 444-7600

23 pp

LIST OF INTERESTED PARTIES

The Petitioners are Mark Morehead and Rocco P. DiGiovanni.

The respondents are correctly identified in the caption. Andrew Rothschild and Eric D. Paulsrud of Lewis, Rice & Fingersh, L.C., are counsel of record for respondent Traylor Brothers, Inc.

This brief in opposition is submitted on behalf of respondent Traylor Brothers, Inc.

TABLE OF CONTENTS

Page

List of Interested Parties i

Table of Contents ii

Table of Citations iii

Statement of Jurisdiction 2

Statement of the Case 2

A. Course of Proceedings and Disposition of the Case Below 2

B. Corrections of Misstatements in the Petition 5

Reasons for Denying the Writ 9

I. Because Traylor Brothers was both vessel owner and employer of DiGiovanni it cannot be liable in damages unless it breached a duty it owed as vessel owner. The district court correctly applied the dual capacity standard as announced by this Court in holding that Traylor Brothers did not breach any duty it owed to DiGiovanni as vessel owner and the court of appeals did not err in affirming the district court's decision 9

A. When, as here, the defendant is both the employer and also the vessel owner, the

covered employee may only bring a third-party negligence action against his employer in its capacity as vessel owner 9

B. A vessel owner's duties under Section 905(b) are limited to those set forth by the Supreme Court in *Scindia* 14

II. This Court has no jurisdiction to consider the second question presented for review in the petition 16

Conclusion 17

TABLE OF CITATIONS

Cases Cited:

Castorina v. Lykes Bros. S.S. Co., 758 F.2d 1025 (5th Cir.), *cert. denied*, 474 U.S. 846 (1985) . . 10, 11

DiGiovanni v. Traylor Brothers, Inc., 959 F.2d 1119 (1st Cir.), *cert. denied*, 506 U.S. 827 (1992) 3, 5-6

DiGiovanni v. Traylor Brothers, Inc., 97 F.3d 624 (1st Cir. 1996) 4

DiGiovanni v. Traylor Brothers, Inc., 855 F.Supp. 37 (D.R.I. 1994), *aff'd*, 97 F.3d 624 (1st Cir. 1996) 3

Fanetti v. Hellenic Lines, Ltd., 678 F.2d 424 (2d Cir. 1982) 4

F.E.C. v. NRA Political Victory Fund, 513 U.S. 88 (1994) 16

F.T.C. v. Minneapolis-Honeywell Regulator Co., 344 U.S. 206 (1952) 17

Howlett v. Birkdale Shipping Co., S.A., 512 U.S. 92, 114 S.Ct. 2057, 129 L.Ed.2d 78 (1994) 12, 15

Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523 (1983) 4, 10

Levene v. Pintail Enters., Inc., 943 F.2d 528 (5th Cir. 1991), *cert. denied*, 504 U.S. 940 (1992) 10, 15

Missouri v. Jenkins, 495 U.S. 33 (1990) 16

Morehead v. Atkinson-Kiewit, J.V., 97 F.3d 603 (1st Cir. 1996) 4

Parker v. South Louisiana Contractors, Inc., 537 F.2d 113 (5th Cir. 1976), *cert. denied*, 430 U.S. 906 (1977) 13

Scindia Steam Navigation Company, Ltd. v. De Los Santos, 451 U.S. 156 (1981) 14

White v. Cooper/T. Smith Corp., 690 F.Supp. 534 (E.D.La. 1988) 13

Statutes Cited:

The Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901 *et seq.* 2

35 U.S.C. § 905(b) . . . . . passim

46 U.S.C. § 688 2

H.R. Rep. No. 92-1441, 92d Cong., 1st Sess. 7-8, *reprinted in* 1972 U.S.C.C.A.N. 4698 15

No. 96-1084

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

MARK MOREHEAD,
Petitioner,

vs.

ATKINSON-KIEWIT, J.V. and WOODS HOLE
TOWING COMPANY, INC.,
Respondents.

ROCCO P. DIGIOVANNI, JR.,
Petitioner,

vs.

TRAYLOR BROTHERS, INC.,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the First Circuit

RESPONDENT TRAYLOR BROTHERS' BRIEF IN OPPOSITION

Respondent Traylor Brothers, Inc. requests that the Court deny the Petition for Writ of Certiorari seeking review of an opinion of the United States Court of Appeals for the First Circuit.

STATEMENT OF JURISDICTION

This Court cannot exercise jurisdiction over the second question presented in the petition for writ of certiorari. The judgment of the First Circuit Court of Appeals holding that the barge in question was not a "vessel in navigation" under the Jones Act, 46 U.S.C. § 688, was entered on March 4, 1992. Appendix G & H, pp. 130a-155a. Petitioner filed a petition for writ of certiorari from that judgment, which was denied. Nothing in the Court of Appeals' subsequent opinion altered or amended its earlier judgment. This Court does not have jurisdiction to review the earlier judgment entered almost five years ago.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition of the Case Below.

This is an admiralty case arising under the Longshore and Harbor Workers' Compensation Act ("LHWCA"). 33 U.S.C. §§ 901 *et seq.* Petitioner Rocco P. DiGiovanni, Jr. brought a claim in the United States District Court for the District of Rhode Island for personal injuries suffered while employed by respondent Traylor Brothers, Inc. ("Traylor Brothers") as a member of a pile driver crew for a project to construct a replacement bridge spanning Narragansett Bay from North Kingston to Jamestown, Rhode Island. This case was first tried to a jury which returned a verdict for DiGiovanni concluding, in part, that the structure on which he was working at the time of his injury was a "vessel in navigation" for the purpose of the Jones Act. A panel of the First Circuit Court of Appeals affirmed, Appendix I, p. 156a, but upon rehearing *en banc*, the First Circuit held as a matter of law that the structure was not a "vessel" for

purposes of the Jones Act. Appendix G, p. 130a; *DiGiovanni v. Traylor Brothers, Inc.*, 959 F.2d 1119 (1st Cir.), *cert. denied*, 506 U.S. 827 (1992). Petitioner omits in his opening Statement of Facts that he sought a writ of certiorari from this Court to review this earlier judgment. This Court denied the petition for writ of certiorari on October 5, 1992. *DiGiovanni v. Traylor Brothers, Inc.*, 506 U.S. 827 (1992). As a result of the earlier First Circuit Court of Appeals ruling, DiGiovanni could not, as a matter of law, recover on his Jones Act claim and the case was remanded for a new trial on DiGiovanni's alternative claim for recovery under Section 905(b) of the LHWCA.

Following a three-day bench trial the district court ruled in favor of Traylor Brothers. Appendix F, p. 118a; *DiGiovanni v. Traylor Brothers, Inc.*, 855 F.Supp. 37 (D.R.I. 1994). The district court concluded that Traylor Brothers held the dual capacities of employer and vessel owner. The district court found, upon the evidence presented at trial, that any negligence of Traylor Brothers was in its capacity as employer, not vessel owner, and therefore DiGiovanni could not make an additional recovery against Traylor Brothers beyond the administrative benefits provided for under the LHWCA. DiGiovanni appealed.

A panel of the First Circuit Court of Appeals, in a two-to-one decision, vacated the decision of the district court. *DiGiovanni v. Traylor Brothers, Inc.*, No. 94-1775 (1st Cir. Feb. 6, 1996); Appendix E, p. 90a. The panel rejected the district court's application of the duty of care owed by a vessel owner in a dual capacity situation as was presented in this case. In reaching its decision the panel did not follow, and characterized as "unelucidated dictum," Appendix E, p. 107a, this Court's statement that Section 905(b) "does make it clear that a vessel owner acting as its

own stevedore is liable only for negligence in its 'owner' capacity, not for negligence in its 'stevedore' capacity." *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 531 n.6 (1983)[1]. The panel declined to adopt the reasoning of two Fifth Circuit decisions[2] which adopted the *Pfeifer* dual capacity doctrine. The panel instead followed a Second Circuit decision, *Fanetti v. Hellenic Lines, Ltd.*, 678 F.2d 424 (2d Cir. 1982), decided prior to *Pfeifer*, in rejecting the application of the dual capacity doctrine to this case. The panel's decision was in direct conflict with another First Circuit panel decision, *Morehead v. Atkinson-Kiewit, J/V*, No. 94-1581 (1st Cir., Feb. 6, 1996); Appendix B, p. 51a, decided the same day, which applied the dual capacity doctrine to affirm a decision of no liability in favor of a dual capacity employer/vessel owner. The First Circuit Court of Appeals granted rehearing *en banc* in both the *Morehead* and *DiGiovanni* cases. In *DiGiovanni* the Court of Appeals vacated the panel's opinion and affirmed the district court's decision. *DiGiovanni v. Traylor Brothers, Inc.*, 97 F.3d 624 (1st Cir. 1996). The court, consistent with its decision in *DiGiovanni*, also affirmed the district court in *Morehead*. *Morehead v. Atkinson-Kiewit, J.V.*, 97 F.3d 603 (1st Cir. 1996).

---

[1] This Court's statement at footnote six of the Pfeifer decision is referred to herein as the "dual capacity doctrine."

[2] *Levene v. Pintail Enters., Inc.*, 943 F.2d 528 (5th Cir. 1991), *cert. denied*, 504 U.S. 940 (1992) and *Castorina v. Lykes Bros. S.S. Co.*, 758 F.2d 1025 (5th Cir.), *cert. denied*, 474 U.S. 846 (1985).

B. Correction of Misstatements of Facts in Petitioner's Statement of the Case

The underlying facts of this case have been largely set forth in the First Circuit's two *en banc* decisions and the district court's findings of fact in the second trial. None of these findings have been challenged by petitioner as clearly erroneous.

In mid 1988, Traylor Brothers took over the construction of the Jamestown Bridge from the prior contractor. *DiGiovanni*, 855 F.Supp at 38; Appendix F, pp. 118a-119a. DiGiovanni was an employee of Traylor Brothers and was hired as a carpenter/pile driver. *Id.* DiGiovanni and his co-workers were assigned the task of constructing coffer dams in the Narragansett Bay. *Id.*

The work on the coffer dams for the Jamestown Bridge project was performed from the decks of barges serving as work platforms. DiGiovanni was part of a work crew that utilized the barge BETTY F, which was owned by Traylor Brothers. "The Betty F was moored on the Bay during the construction phase of the project but was maneuvered about on the water at times in order to be positioned for construction of the coffer dams and bridge piers." Appendix F, p. 119a.

The facts concerning the BETTY F and the attendant supply barges are contained in the reported opinion of the First Circuit Court of Appeals (*en banc*) in *DiGiovanni v. Traylor Brothers, Inc.*, 959 F.2d 1119 (1st Cir. 1992), *cert. denied*, 506 U.S. 827 (1992); Appendix G, and are quoted verbatim:

> Briefly, the facts are these. The BETTY F was a barge, 100 feet in length, with a 40 foot beam and a raked bow and stern, and with nautical equipment, such as navigation and anchor lights. In all respects it met the commonly understood characteristics of a vessel, and, indeed, was inspected by the Coast Guard. It had no means of self-propulsion, except that positional movement could be achieved by manipulating its spud anchors. Its current use was to float at the Jamestown, Rhode Island, bridge, bearing a crane that was being used for bridge construction. Its permanent station was Davisville, Rhode Island, from which it was towed, by a tug, from time to time, to perform various shore jobs. It had been at the Jamestown bridge for a month. It was positioned about the bridge, and moved away from the pilings at night, to prevent damage.
>
> Plaintiff's principal duty was to handle a tag line to guide the crane, but he also did maintenance work, such as painting, and tended lines. Although he was attached to the BETTY F, at the time of his injury he was standing on the deck of a supply barge in order better to manipulate the line. Its deck proved to be slippery, and he fell. The supply barge was in general use to carry supplies, but also served as a work platform.

959 F.2d 1120-1; Appendix G, p. 131a-132a.

* * * *

> The BETTY F had transported nothing for a month since it left defendant's headquarters in Davisville. Since then it was simply moved about the piers for working convenience, and at night for safety. This was hardly navigation or commerce, and did not diminish the primary nature of the platform's shore use and purpose. (cite omitted) Correspondingly, that plaintiff occasionally adjusted lines for pier movement and the rise and fall of the tides, did not expose him to the risks of a voyage.
>
> There is a suggestion that the supply barge, on which plaintiff was injured, was operating as a vessel. This barge was in general use, and was not "attached" to the BETTY F, and plaintiff was not "assigned permanently" thereto. (cite omitted) Nor did he use it except as a work platform.

959 F.2d at 1124; Appendix G., pp. 139a-140a.

On September 30, 1988, DiGiovanni was working on the supply barge adjacent to the BETTY F. While walking across a portion of the deck of the supply barge that contained hydraulic fluid, DiGiovanni slipped, lost his balance and fell. DiGiovanni sustained injuries to his back which he claims are permanent. 855 F.Supp. at 39; Appendix F, p. 120a. DiGiovanni sued Traylor Brothers under the Jones Act and the LHWCA. In DiGiovanni's first appeal to the First Circuit his Jones Act claim was dismissed as a matter of law because the court found the BETTY F was not a "vessel in navigation" under the Jones Act. This Court has already refused certiorari on that issue and that judgment is final and not subject to further review.

Following a bench trial, on remand the district court found for Traylor Brothers on DiGiovanni's claim under Section 905(b) of the LHWCA. The district court found:

> Assuming that Brush [Traylor Brothers' general superintendent] knew about the fluid hazard, that knowledge cannot be attributed to the owner. Brush was clearly working within the construction division of defendant's organization. His duties had nothing to do with the vessel's ownership.

DiGiovanni, 855 F.Supp. at 42; Appendix F, p. 128a. DiGiovanni incorrectly asserts in his petition that Brush was responsible for the barges. The following facts are drawn from the trial transcript. Dale Smith was Traylor Brothers' project manager at the Jamestown construction site. Mr. Brush was the general superintendent and reported to Mr. Smith. Starting in 1968 Mr. Brush worked his way up from carpenter to pile driver and then to foreman. Brush has been a member of the Carpenter and Pile Driver and Joiners Union of America for twenty three years. Brush worked for a number of years in heavy and light construction. For the three years before working for Traylor Brothers he worked as a pile driver superintendent. Mr. Brush supervised the union work crews consisting of three pile driving crews, a carpenter crew, a labor crew and a master mechanic with three or four mechanics under him. DiGiovanni's own witnesses testified that "Ed Brush is the superintendent for the pile drivers on the job," he "was like the pile driver foreman." DiGiovanni himself testified on direct examination that Ed Brush "was the superintendent of the pile drivers ***and that's all***." The foremen and members of the work crews, including plaintiff DiGiovanni, were hired from the local union halls having jurisdiction over the particular job function. Brush's job was to "line up the

various crews to perform the work on a daily basis . . . whether it was pile driving, carpenter, labor work or mechanic work. . ." All of Mr. Brush's duties and responsibilities, as set forth in the district court record, related solely to Traylor Brothers' capacity as DiGiovanni's employer, not as vessel owner.

REASONS FOR DENYING THE WRIT

I.

BECAUSE TRAYLOR BROTHERS WAS BOTH VESSEL OWNER AND EMPLOYER OF DIGIOVANNI IT CANNOT BE LIABLE IN DAMAGES UNLESS IT BREACHED A DUTY IT OWED AS VESSEL OWNER. THE DISTRICT COURT CORRECTLY APPLIED THE DUAL CAPACITY STANDARD AS ANNOUNCED BY THIS COURT IN HOLDING THAT TRAYLOR BROTHERS DID NOT BREACH ANY DUTY IT OWED TO DIGIOVANNI AS VESSEL OWNER AND THE COURT OF APPEALS DID NOT ERR IN AFFIRMING THE DISTRICT COURT'S DECISION.

A. When, as here, the defendant is both the employer and also the vessel owner, the covered employee may only bring a third-party negligence action against his employer in its capacity as vessel owner.

Traylor Brothers was DiGiovanni's employer and owned or operated the barge on which DiGiovanni slipped and fell. In cases such as this, the distinction between the employer capacity and the vessel owner capacity are critical for the purposes of determining the scope of the vessel owner's duty under Section 905(b) of the LHWCA. This

Court has stated that Section 905(b) "does make it clear that a vessel owner acting as its own stevedore is liable only for negligence in its 'owner' capacity, not for negligence in its 'stevedore' capacity." *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 531 n.6 (1983); *see Levene v. Pintail Enterprises, Inc.*, 943 F.2d 528, 531 (5th Cir. 1991), *cert. denied*, 119 L.Ed.2d 201 (1992); *Castorina v. Lykes Brothers Steamship Co., Inc.*, 758 F.2d 1025, 1031-3 (5th Cir.), *cert. denied*, 474 U.S. 846 (1985). In *Levene*, the Fifth Circuit succinctly summarized the issue as follows:

> Frequently, however, a longshoreman is injured on a vessel owned by his employer. When an employer acts in a dual capacity as vessel owner, the entity retains its immunity for acts taken in its capacity as an employer, but may still be sued "qua vessel" for acts of vessel negligence. *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 532, 103 S.Ct. 2541, 2548, 76 L.Ed.2d 768 (1983); *Kerr-McGee Corp. v. Ma-Ju Marine Serv., Inc.*, 830 F.2d 1332, 1339 (5th Cir. 1987). The difference between the capacities in which an employer may act is extremely important. The availability of a tort remedy for vessel negligence is a limited exception to the general structure of the LHWCA, which, like state workers compensation schemes, generally replaces negligence causes of action against employers with a system of predetermined, standardized benefits. · Therefore, we have held that an employer that also functions as a vessel owner is liable for vessel negligence under the same negligence standards applicable to an independent vessel owner. *Castorina v.*

> *Lykes Bros. S.S. Co.*, 758 F.2d 1025, 1033 (5th Cir.), *cert. denied*, 474 U.S. 846, 106 S.Ct. 137, 88 L.Ed.2d 113 (1985) ("duty is neither heightened nor diminished when the longshoreman is employed directly by the vessel"). The LHWCA absolutely bars suit for all other acts taken in the capacity as the employer of the injured worker.

943 F.2d at 531 (footnote omitted).

As the district court in this case concisely stated the issue:

> The LHWCA immunizes defendant from tort liability in its capacity as the employing contractor. 33 U.S.C. § 905(a). In its capacity as vessel owner, defendant may be sued for the negligence of the vessel only. 33 U.S.C. § 905(b). The Supreme Court stated in *Pfeifer*, "[A] vessel owner acting as its own stevedore is liable only for negligence in its 'owner' capacity, not for negligence in its 'stevedore' capacity." 462 U.S. at 531 n. 6.

DiGiovanni, 855 F.Supp. at 40; Appendix F, pp. 122a-123a.

In *Castorina*, 758 F.2d at 1033, the Fifth Circuit discussed the dual capacity issue and held that the operational knowledge acquired as employer should not be imputed to it as vessel owner for the purposes of a Section 905(b) action:

> This specific separation of duties and remedies, detailed in the Act, does not change

> simply because the shipowner directly employs its own stevedoring personnel. In this situation, the stevedore's knowledge of dangerous conditions that may have arisen during the cargo operations should not be imputed to the shipowner, nor should the shipowner be deemed to know that the stevedore's actions in dealing with such dangers are obviously improvident. To impute this knowledge to a shipowner-employer would be to hold it liable in tort for damages arising from its negligence as stevedore, and effectively to eliminate the exclusivity provisions of Section 905(a) & (b). This result is contrary to the language and purpose of the Act as amended. We therefore hold that the duty owed by a shipowner to a longshoreman under Section 905(b) is that established by *Scindia* and its progeny; this duty is neither heightened nor diminished when the longshoreman is employed directly by the vessel.

As this Court recently recognized, Section 905(b) was enacted in 1972 and "effected fundamental changes in the nature of the third-party action" against the vessel. *Howlett v. Birkdale Shipping Co., S.A.*, 512 U.S. 92, 114 S.Ct. 2057, 2062, 129 L.Ed.2d 78, 86 (1994). The 1972 amendments "abolished the longshoreman's pre-existing right to sue a shipowner based upon the warranty of seaworthiness . . ., eliminated the stevedore's obligation . . . to indemnify a shipowner," and, in turn, "provided for a substantial increase in the statutory benefits injured longshoremen are entitled to receive from their stevedore-employers." 114 S.Ct. at 2062-63.

> The design of these changes was to shift more of the responsibility for compensating injured longshoremen to the party best able to prevent injuries: the stevedore-employer. Subjecting vessels to suit for injuries that could be anticipated and prevented by a competent stevedore would threaten to upset the balance Congress was careful to strike in enacting the 1972 Amendments.

114 S.Ct. at 2063 (citation omitted).

The dual capacity doctrine is consistent with the purpose of Section 905(b). "[S]ection 905(b) is primarily designed to prevent continued circumvention of Section 905(a) of the LHWCA, which makes compensation the employee's exclusive remedy against his employer. *Parker v. South Louisiana Contractors, Inc.*, 537 F.2d 113, 117 (5th Cir. 1976), *cert. denied*, 430 U.S. 906 (1977). "Taken as a whole, the manifest purpose of Section 905(b) is to curtail rather than expand the availability of third party actions in admiralty." *Id.* Petitioner would instead have the exception (liability for vessel owners in certain limited circumstances of vessel negligence) swallow the rule (exclusive remedy for employee against employer is compensation). *See White v. Cooper/T. Smith Corp.*, 690 F.Supp. 534, 539 (E.D.La. 1988) ("narrow Section 905(b) exception" should not be allowed to "swallow up the general rule prohibiting an LHWCA employee from suing his employer").

Petitioner asks this Court to reject the application of dual capacity doctrine to this case. Petitioner would cast aside as "unelucidated dictum," this Court's affirmation that dual capacity status does not alter the limited claims

available to a maritime worker under Section 905(b). *Pfeifer*, 462 U.S. at 531 n.6 (1983).

The First Circuit, *en banc*, stated, that in order for an employee to recover against his employer in a dual capacity case, the employee "has to show that any negligence on [the employer's] part is attributable to it as vessel rather than as [the employee's] insured LHWCA employer." *Morehead*, Appendix A, p. 11a. *Morehead* follows this Court's lead in *Pfeifer*, Appendix A, p. 16a, and rejects the Second Circuit's decision in *Fanetti*. Appendix A, pp 19a-20a. *Fanetti* was decided before *Pfeifer* was handed down and the First Circuit "doubt[ed] that the Second Circuit today would endorse *Fanetti's* broadened duty of care." Appendix A, p. 19a.

B. A vessel owner's duties under Section 905(b) are limited to those set forth by the Supreme Court in *Scindia*.

In *Scindia Steam Navigation Company, Ltd. v. De Los Santos*, 451 U.S. 156 (1981), this Court articulated the scope of a vessel's duty to a longshoreman under Section 905(b) of the LHWCA. The basic principle which emerges from *Scindia* is that the primary responsibility for the safety of the longshoreman rests upon the stevedore. Despite this broad statement of vessel immunity, vessel liability may arise:

(1) if the vessel owner fails to warn on turning over the ship of hidden defects of which he should have known.

(2) for injury caused by hazards under the control of the ship.

(3) if the vessel owner fails to intervene in the stevedore's operation when he has actual knowledge both of the hazard and that the stevedore, in the exercise of obviously improvident judgment, means to work on in the fact of it and therefore cannot be relied on to remedy it.

See Howlett, 114 S.Ct. at 2063.

Although the *Scindia* case involved stevedoring operations, the duties it enumerates are not limited to stevedores. They are applicable to all harbor workers, such as DiGiovanni, covered by the LHWCA. *Levene*, 943 F.2d at 533.

Petitioner asks the Court to moot the application of *Scindia's* turnover duty by rejecting the dual capacity doctrine and concluding that, in cases such as this, no turnover can occur between Traylor Brothers as employer and Traylor Brothers qua vessel owner. Such a decision would impose greater duties, and correspondingly greater burdens, on a dual capacity employer, such as Traylor Brothers, than would be the case for a single capacity employer. Petitioner would have this Court impose almost strict liability on a dual capacity employer contrary to this Court's statement in *Pfeifer* at footnote six. This is also directly contrary to legislative admonition that single and dual capacity employers are charged with the same duty of care. Indeed, abrogating *any* application of the *Scindia* turnover duty to a dual capacity employer cannot be squared with the legislative history -- "that the '*same principles* [i.e., the *Scindia* duties of care] should apply in determining the liability of the vessel' in both 'single capacity' and 'dual capacity' cases." H.R. Rep. No. 92-1441, 92d Cong., 1st

Sess. 7-8, *reprinted in* 1972 U.S.C.C.A.N. 4698, 4705. This Court should reject petitioner's contention.

II.

THIS COURT HAS NO JURISDICTION TO CONSIDER THE SECOND QUESTION PRESENTED FOR REVIEW IN THE PETITION BECAUSE PETITIONER REQUEST FOR A WRIT OF CERTIORARI WAS PREVIOUSLY DENIED ON OCTOBER 5, 1992 AND THE NEW JUDGMENT FROM A SUBSEQUENT APPEAL DID NOT ALTER OR AMEND THE FIRST JUDGMENT.

Petitioner, in the second point of his petition for writ of certiorari, asks for a second time that this Court review the final judgment of the First Circuit Court of Appeals entered on March 4, 1992. This Court denied petitioner's first request for a writ of certiorari to review that judgment. *DiGiovanni v. Traylor Brothers, Inc.*, 506 U.S. 827 (1992). "A petition for certiorari in a civil case must be filed within 90 days of the entry of judgment below." *F.E.C. v. NRA Political Victory Fund*, 513 U.S. 88, 115 S.Ct. 537, 539 (1994). This "90-day limit is mandatory and jurisdictional." *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990). DiGiovanni's most recent petition for certiorari is untimely in seeking review of the March 4, 1992, judgment of the First Circuit Court of Appeals.

The First Circuit's second *en banc* decision on DiGiovanni's LHWCA claim does not reopen the first judgment on DiGiovanni's Jones Act claim to a second petition for certiorari. "Only when the lower court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered should the period within which

an appeal must be taken or a petition for certiorari filed begin to run anew." *F.T.C. v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211-12 (1952). The second First Circuit decision did nothing to alter the prior judgment. "The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligation which, by its prior judgment, had been plainly and properly settled with finality." *Id.* DiGiovanni's Jones Act claim was fully and finally resolved on March 4, 1992 when the First Circuit, *en banc*, held that the barge in question was not a "vessel in navigation." This Court has already denied a petition for certiorari from that judgment. This Court lacks jurisdiction to review by certiorari the second issue raised in the petition.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for certiorari.

Respectfully submitted,

Andrew Rothschild
Counsel of Record for Respondent Traylor Brothers, Inc.
Eric D. Paulsrud
Appearing on the Brief

LEWIS, RICE & FINGERSH, L.C.
500 North Broadway, Suite 2000
St. Louis, Missouri 63102

(314) 444-7600